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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA, BY AND THROUGH ATTORNEY GENERAL XAVIER BECERRA AND CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA *EX REL.* ATTORNEY GENERAL JOSHUA H. STEIN, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON, STATE OF WISCONSIN, COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA, THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, THE DISTRICT OF COLUMBIA, AND THE CITY OF NEW YORK,**

Plaintiffs,

**v.**

**ANDREW R. WHEELER, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; R. D. JAMES, AS ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; AND UNITED STATES ARMY CORPS OF ENGINEERS,**

Defendants.

Case No. 3:20-cv-03005-RS

**PLAINTIFFS' OPPOSITION TO MOTIONS TO INTERVENE BY: (1) BUSINESS ORGANIZATIONS (ECF No. 43); AND (2) CHANTELL AND MICHAEL SACKETT (ECF No. 45)**

Action Filed: May 1, 2020

[No hearing per Court Order, ECF No. 80]

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## INTRODUCTION

Plaintiffs oppose the motions to intervene filed by the Business Organizations[1] and the Sacketts (collectively, Proposed Intervenors) in this challenge to *The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250 (Apr. 21, 2020)[2] (2020 Rule). The motions to intervene should be denied because the Business Organizations and the Sacketts each have failed to meet their burden to show that intervention to defend the 2020 Rule alongside the defendant Agencies (Agencies) is warranted.

Proposed Intervenors cannot show they are entitled to intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure because they have not presented evidence to rebut the presumption that their interests are adequately represented by the Agencies. In fact, Proposed Intervenors have failed to demonstrate that they meet any of the three factors the Ninth Circuit uses to determine the inadequacy of representation requirement.

Proposed Intervenors similarly fail to demonstrate they should be allowed leave to intervene permissively under Rule 24(b) of the Federal Rules of Civil Procedure. The same infirmities in the Proposed Intervenors' motions that require denying intervention as of right also demonstrate that this Court should exercise its discretion to deny their alternative requests for permissive intervention, particularly given that Plaintiffs would be unduly prejudiced if intervention by the Proposed Intervenors is allowed.

Accordingly, Plaintiffs respectfully request that this Court deny the motions to intervene filed by the Proposed Intervenors. If the Court is inclined to rule otherwise, then Plaintiffs respectfully request that only one motion be granted because intervention by the Business Organizations and the Sacketts would be needlessly duplicative given that they purport to

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[1] The Business Organizations are the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Chamber of Commerce of the United States of America; Edison Electric Institute; Leading Builders of America; National Alliance of Forest Owners; National Association of Home Builders; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; and U.S. Poultry & Egg Association. ECF No. 43 at 1.

[2] The 2020 Rule is available at https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states.

represent the same interests. Alternatively, if this Court is inclined to grant intervention to both the Business Organizations and the Sacketts, Plaintiffs request that the Court issue an order requiring the intervenors to file consolidated briefs and providing other safeguards to mitigate the prejudice to Plaintiffs and the burden on judicial resources.

## ARGUMENT

### I. INTERVENTION AS OF RIGHT MUST BE DENIED BECAUSE THE PROPOSED INTERVENORS HAVE FAILED TO ESTABLISH THAT THE AGENCIES WILL NOT ADEQUATELY REPRESENT THEIR INTERESTS.

Proposed Intervenors seek to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, which has several "requirements," including that a proposed intervenor's "interest must not be adequately represented by existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). The Ninth Circuit applies a three-factor test to determine whether "existing parties adequately represent" a proposed intervenors' interest. *Id.* at 1086. This test considers: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Id.* The burden to establish these factors is on the proposed intervenor. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (*NFRC*).

Where, as here, the "ultimate objective for both defendant and intervenor-defendants is upholding the validity of" a government action, "a presumption arises that [the government] defendant is adequately representing intervenor-defendants' interests." *Prete v. Bradbury*, 438 F.3d 949, 957 (9th Cir. 2006); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (where proposed intervenors "presented no evidence that would lead us to doubt that the federal defendants' ultimate objective is to uphold the challenged" government action, the "presumption of adequate representation applies"). This "presumption can be rebutted only by 'a compelling showing to the contrary.'" *Freedom from Religion*, 644 F.3d at 841 (quoting *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009)).

Here, the presumption of adequate representation applies and Proposed Intervenors have

not overcome it. The Proposed Intervenors and the Agencies share the goal of defending the 2020 Rule to ensure a narrower definition of "waters of the United States" than in prior rules. *See*, *e.g.,* Business Organizations' Motion (ECF No. 43) at 5, 13 (seeking to defend 2020 Rule to oppose a "return to a broader definition of WOTUS and greater federal regulation" under 2015 Rule); Sacketts' Motion to Intervene (ECF No. 45) at 10 (arguing that the 2020 Rule's narrower definition of "adjacent wetlands" must be upheld because it is mandated by the controlling plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*)); 85 Fed. Reg. at 22,266, 22,273, 22,289, 22,309, 22,278-79 (rejecting the "waters of the United States" definition in the 2015 Rule and relying on the *Rapanos* plurality opinion to narrow the definitions of "waters of the United States" and "adjacent wetlands" in the 2020 Rule). The Proposed Intervenors have failed to make the "very compelling showing" required to rebut this presumption of adequate representation, and the Court should deny leave to intervene. *Dep't of Fair Employment & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 740 (9th Cir. 2011).

### A. The Proposed Intervenors Cannot Satisfy the First Factor Because They Have Not Identified Any Potentially Meritorious Arguments They Will Raise that the Agencies Will Neglect.

#### 1. The Business Organizations Do Not Identify Any Arguments They Will Make that the Agencies Will Neglect.

Where intervenors have been able to "overcome" the presumption of adequate representation, they have done so "through the presentation of direct evidence that the United States will take a position that actually compromises" the government action the intervenors seek to defend. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 445 (9th Cir. 2006) (*Lockyer*). For example, in *Lockyer*, which the Business Organizations cite, the government's neglect of the intervenors' arguments was "not just a theoretical possibility; it ha[d] already done so" on summary judgment. *Id.* at 444.

The Business Organizations do not identify with specificity *any* argument they will raise if allowed to intervene in this action, much less an argument they will raise that the Agencies may neglect. Nor do the Business Organizations present any evidence that the Agencies will take a position that contradicts the Business Organizations' position. In fact, as the Business

Organizations admit, by limiting the "scope of the agencies' jurisdiction," the 2020 Rule adopts an interpretation of the Clean Water Act (CWA) advocated by the Business Organizations in their comments submitted to the Agencies during the rulemaking process. ECF No. 43 at 12-14. Further, the Business Organizations note that, in other litigation, they have "argued against a definition of WOTUS that violates the Constitution and unlawfully expands the agencies' regulatory jurisdiction under the CWA, and explained the need for regulatory predictability and consistency." ECF No. 43 at 13. But those arguments are made by the Agencies in the 2020 Rule, which states that interpreting "waters of the United States" narrowly so as to curtail the Agencies' jurisdiction is required by "Constitutional and statutory limitations," 85 Fed. Reg. at 22,262, 22,273, and the need for "greater regulatory predictability." 85 Fed. Reg. at 22,252, 22,270, 22,272-22,273, 22,317-18, 22,331. Moreover, the Agencies have repeated those arguments in their opposition to Plaintiffs' preliminary injunction. ECF No. 106 at 13, 19, 22, 37.

Nor do the Business Organizations point to evidence that "the government [is] less than enthusiastic about" mounting a defense, as intervenors have done in cases where intervention was granted. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) (*LULAC*). Here, as in cases where intervention has been denied, the Executive Branch "issued an executive order" and has offered "outspoken support for" the government action challenged, demonstrating the federal government's willingness to defend its actions. *Id.*; 85 Fed. Reg. at 22,259, 22,261, 22,270 (discussing President Trump's Executive Order 13778 "direct[ing]" the Agencies to "rescind[] or revis[e]" the 2015 Rule and to interpret the "waters of the United States" consistent with the *Rapanos* plurality opinion, which the Agencies did by promulgating the 2020 Rule).

The Business Organizations' generalized assertions that the Agencies, "as neutral regulatory bodies, cannot represent the interests of the regulated business community with the same perspective and vigor" are insufficient to overcome the presumption of adequacy of representation by the Agencies. ECF No. 43 at 6; *see People of State of California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (proposed intervenor's assertion that it would "argue[] its interests more vigorously than existing parties d[id] not amount to a showing

of inadequate representation of its interests"). Regardless, the Agencies continue to "vigorously defend[]" the 2020 Rule, as shown in their opposition[3] to Plaintiffs' "motion for a preliminary injunction." *LULAC*, 131 F.3d at 1305.

Similarly unavailing is the Business Organizations' assertion that intervention as of right is required because the "interest of private business is just one among many varied and often competing constituencies represented by the agencies." ECF No. 43 at 16. Protecting the ability of private entities, such as the Business Organizations, to use and enjoy their private property, ECF No. 43 at 12, is one of the reasons the Agencies adopted a narrow interpretation of the Clean Water Act's scope in the 2020 Rule. 85 Fed. Reg. at 22,270 (adopting 2020 Rule to avoid "troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property"). While the Business Organizations cite *Forest Conservation Council v. U.S. Forest Service*, that case is inapposite because there the intervenors were not private businesses but rather the State of Arizona and one of its counties, which intervened to protect their "non-economic interests, such as the environmental health of, and wildfire threats to, *state* lands." 66 F.3d 1489, 1497 (9th Cir. 1995). The Court found intervention warranted because the federal government "is not charged with a duty to represent these asserted interests" by state and county governments. *Id.* at 1499, *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (emphasis added).

The Business Organizations' reliance on two out-of-circuit cases to argue that they can "satisfy" their burden by simply asserting that the "government must represent the broad public interest, not just the economic concerns" of a particular industry is misplaced. ECF No. 43 at 16. These cases do not actually stand for that proposition and, regardless, are distinguishable. First, unlike the Business Organizations here, the intervenors in *Sierra Club v. Espy* were allowed to intervene *after* the government issued a letter interpreting a preliminary injunction broadly to bar future activities directly interfering with intervenors' interests. 18 F.3d 1202, 1204 (5th Cir. 1994). The court did not rely on general assertions by the intervenors but rather on specific evidence, holding that the intervenors had "demonstrated, through [the government's] letter …

[3]ECF No. 106 at 13, 19, 22, 37.

that the government's representation of their interest is inadequate." *Id.* at 1207–08. Here, in contrast, the Business Organizations point to no evidence that the Agencies will adopt a position that is contrary to the Business Organizations' interests. Rather, as the Business Organizations concede, the 2020 Rule adopts a narrow interpretation of the Clean Water Act that limits the "scope of the agencies' jurisdiction," consistent with the Business Organizations' comments during the rulemaking and in a manner that "benefit[s] their members." ECF No. 43 at 12-14. Second, the Business Organizations cite dicta from an unpublished South Carolina district court case which held it was "unnecessary" to decide "whether the standards for mandatory intervention [as of right] are satisfied." *S.C. Coastal Conservation League v. Pruitt*, No. 18-CV-330-DCN, 2018 WL 2184395, at *9 (D.S.C. May 11, 2018). That decision does not address, much less justify, intervention as of right under the Ninth Circuit's three-factor test.

Finally, the Business Organizations' participation in other lawsuits against or involving the EPA does not prove that the Agencies are inadequate representatives in the present case. ECF No. 43 at 13-15. The Ninth Circuit has upheld the denial of intervention even where the proposed defendant-intervenor not only had "sued the government numerous times" but "disagreed" as to the correct position to take in opposing injunctive relief. *NFRC*, 82 F.3d at 838 (9th Cir. 1996). The Court denied intervention because the government and the intervenor were both "seeking the same limited interpretation" of a statute. *Id.*; *see also Perry*, 587 F.3d at 951 (affirming denial of intervention notwithstanding proposed intervenors' other "lawsuits" challenging similar law to that at issue in case where intervention was sought).[4] The same is true here, where the Business Organizations and the Agencies are seeking to defend the 2020 Rule's narrow interpretation of "waters of the United States."

For these reasons, the Business Organizations have failed to meet their burden to show that the Agencies will not adequately represent their interests under the first factor of the Ninth Circuit's test.

[4] The Business Organizations note that some unspecified subset of them have "been involved in some" cases challenging prior rules interpreting the Clean Water Act that were issued in 2015 and 2019. ECF No. 43 at 3-4 & n.2. But they have not identified any case granting them intervention as of right under the Ninth Circuit standard applicable here.

**2. The Sacketts Have Similarly Failed to Identify Any Arguments They Will Make But the Agencies Will Neglect.**

The abovementioned Ninth Circuit authority likewise forecloses the Sacketts' argument that their lawsuit against the EPA renders the Agencies inadequate representatives. ECF No. 45 at 9. As with the Business Organizations, the limited interpretation of "waters of the United States" urged by the Sacketts is in line with the Agencies' position. ECF No. 45 at 5, 10; 85 Fed. Reg. at 22,266, 22,273, 22,289, 22,309, 22,278-79.

Nor is there any merit to the Sacketts' suggestion that the Agencies are inadequate representatives because they have "a variety of regulatory interests," whereas the Sacketts have an interest as "private landowners" in being able to "develop, use, and enjoy their residential property." ECF No. 45 at 9. In fact, the Agencies specifically cited the Sacketts' ongoing litigation against the EPA to argue that the 2020 Rule is needed to provide regulatory certainty and protect property owners, such as the Sacketts, from "the significant civil and criminal penalties associated with the CWA." 85 Fed. Reg. at 22,270 (citing *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) and *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, J., concurring)). Accordingly, the Agencies' interest in construing the Clean Water Act narrowly to protect property owners—including the Sacketts specifically—aligns with the Sacketts' interests in being able to develop their property without the need to obtain a Clean Water Act permit. *See* ECF No. 45 at 7.

The Sacketts do identify one argument they will make that the Agencies will not: an argument that the 2020 Rule is compelled by "the controlling plurality opinion in *Rapanos*." ECF No. 45 at 10. However, "just because the government theoretically may offer" a different defense than the proposed defendant-intervenor "does not mean that the [latter] has overcome the presumption of adequacy of representation." *Lockyer*, 450 F.3d at 444. Rather, "the proposed intervenor must demonstrate a likelihood that the government will abandon or concede a *potentially meritorious* reading of the statute." *Id.* at 444 (emphasis added). As discussed in Section I.C.2 below, the Sacketts' argument (that the *Rapanos* plurality opinion compelled the Agencies to issue the 2020 Rule) was rejected by the Agencies and therefore cannot now be a

basis to uphold the 2020 Rule. Accordingly, the Sacketts failed to establish inadequacy of representation under the first factor of the Ninth Circuit's test.

**B. The Proposed Intervenors Cannot Satisfy the Second Factor Because They Have Not Established that the Agencies May Be Unwilling to Defend the 2020 Rule in the Future.**

**1. Business Organizations' Speculation About the Agencies' Potential Unwillingness to Defend the 2020 Rule Fails to Support Intervention.**

The Business Organizations assert, without authority, that they are entitled to intervene because "there is a risk that a change in Administration or policy could undermine the agencies' resolve to defend the merits." ECF No. 43 at 16. This "prospect of inadequate representation on the part of *future* defendants in *future* years is purely speculative" and so cannot support intervention here. *LULAC*, 131 F.3d at 1304. If "speculation about the effects of a change of administration were sufficient to meet movant's burden of demonstrating inadequate representation, then proposed intervenors could *always* satisfy" that requirement "if the defendant were a [ ] government entity." *Id.* at 1307.

The Business Organizations next argue that they are entitled to intervene because there is "no guarantee that the agencies" will appeal an adverse ruling, citing *Sierra Club, Inc. v. EPA*, 358 F.3d 516 (7th Cir. 2004). ECF No. 43 at 16.[5] But the Ninth Circuit has rejected that argument as well. *Freedom from Religion*, 644 F.3d at 842. After all, "if the mere possibility that the federal defendants might decline to appeal were sufficient to rebut the presumption of adequacy, then nearly every case involving a federal defendant would be subject to intervention as of right." *Id.* Unable to offer any "evidence that the government is not willing and able to appeal," the Business Organizations have "fail[ed] to make a 'compelling showing' that would rebut the presumption that the federal government will adequately represent [their] interests." *Id.*

[5] The Business Organizations' citation to this out-of-circuit case is all the more curious because it *denied* intervention to proposed defendant-intervenors on grounds that would likewise here bar not only intervention but even amici status. *Sierra Club*, 358 F.3d at 518. There, the court held that a proposed defendant-intervenor, the Illinois State Chamber of Commerce, lacked the requisite "interest relating to the property or transaction which is the subject of the action" because "its concern" was simply "a political or programmatic one: the Chamber favors more business and less environmental regulation. That does not justify intervention. Indeed, it does not necessarily justify even a filing as amicus curiae." *Id.*

(quoting *Perry*, 587 F.3d at 951).

**2. The Sacketts' Argument Based on Speculation about the "Vicissitudes of Agency Politics" Similarly Fails to Support Intervention.**

The abovementioned authority likewise forecloses the Sacketts' argument that intervention is necessary because of the Agencies' purported "institutional interest in preserving their judgment, power and discretion" and the "vicissitudes of agency politics" that has resulted in the 2020 Rule "revers[ing] earlier rules issued by the very same agencies." ECF No. 45 at 10. The Sacketts fail to explain how the Agencies' "institutional interests" or "inconsistent positions" on the scope of the Clean Water Act's jurisdiction show that the Agencies are "unable to mount an effective defense." *Prete*, 438 F.3d at 957. In any event, the Sacketts' speculative "fears that the federal defendants might" take a position contrary to the Sacketts is not enough to meet their burden where there is "no evidence that the federal defendants actually *have*" done so in this litigation. *Freedom from Religion*, 644 F.3d at 842 (presumption of adequate representation was not overcome when proposed intervenor failed to present evidence that the federal government would argue a narrower interpretation of the challenged statute); *Prete*, 438 F.3d at 958 (error to grant intervention because, absent "evidence," it was not "sufficient to meet their burden of a 'compelling showing'" for intervenors to argue that government defendant "may be inclined" to offer an argument contrary to that advanced by intervenors). Accordingly, the Sacketts' "vague speculation falls far short of a 'very compelling showing'" required to rebut the presumption of adequate representation. *Lucent Technologies*, 642 F.3d at 740.

**C. The Proposed Intervenors Fail to Meet the Third Factor Because They Do Not Offer Necessary Elements to This Litigation.**

**1. The Business Organizations Should Be Denied Intervention Because Their Participation Would Be Redundant.**

The Business Organizations have not shown that they will offer necessary elements the Agencies will neglect and, therefore, should be denied leave to intervene. Indeed, having failed to articulate *any* arguments they will make if allowed to intervene, the Business Organizations have not shown that their (unspecified) arguments are necessary to this litigation. In fact, as detailed above in Section I.A.1, the Business Organizations admit that the 2020 Rule embraces

the position that they advocated in comments submitted during the rulemaking, and the 2020 Rule itself relies on the same arguments the Business Organizations claim to have made in other litigation. Accordingly, far from offering necessary elements to this case, the Business Organizations' "intervention would be redundant." *People of State of California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (affirming denial of intervention).

**2. The Sacketts Similarly Have Failed to Show They Will Raise Any Potentially Meritorious Arguments that the Agencies Will Neglect.**

Even where the government "may not defend" a case "in the exact manner that" a proposed intervenor would, this does not mean the intervenor offers the requisite "*necessary* elements to the proceeding." *Perry*, 587 F.3d at 954 (9th Cir. 2009) (quoting *Arakaki,* 324 F.3d at 1086). Rather, "to make a 'very compelling showing' of the government's inadequacy, a proposed intervenor must demonstrate a likelihood that the government will abandon or concede a *potentially meritorious* reading of the statute." *Lockyer*, 450 F.3d at 444 (emphasis added).

The sole argument the Sacketts claim the Agencies will neglect is foreclosed by well-established law barring post-hoc justifications of agency rules. The Sacketts contend that the Agencies will not defend the 2020 Rule's "redefinition of 'adjacent wetlands'" by making the Sacketts' preferred argument: that this redefinition "is legally compelled by Supreme Court precedent – the controlling plurality opinion in *Rapanos*." ECF No. 45 at 10. But in the 2020 Rule, the Agencies specifically rejected the argument that they are compelled to apply the *Rapanos* plurality opinion. 85 Fed. Reg. at 22,273 ("The agencies disagree with commenters' suggestion that the Executive Order requires the agencies to rely exclusively on Justice Scalia's opinion in *Rapanos.*"). Instead, in forging the 2020 Rule, the Agencies claim they "looked to the text and structure of the CWA, as informed by its legislative history and Supreme Court *guidance*, and took into account the agencies' expertise, policy choices, and scientific principles." 85 Fed. Reg. at 22,252 (emphasis added). Because an agency's actions can be upheld only on the basis of the agency's contemporaneous justifications and cannot be supported by a rationale the Agencies themselves rejected, the 2020 Rule cannot be defended with the Sacketts' argument, which is nothing more than a post-hoc rationalization. *See Motor Vehicle Ass'n of U.S., Inc. v.*

*State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *see also Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 884 (9th Cir. 2013) (a court's review must "begin[] and end[] with the reasoning that the agency relied upon in making the decision"; courts cannot "revise [an agency's] assumptions"); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("the focal point of judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). The Sacketts cannot defend the 2020 Rule with an argument that the Agencies rejected, and the Sacketts have not identified any other arguments that they will make but the Agencies will neglect. Therefore, the Sacketts have failed to meet their burden to show that they will offer "potentially meritorious" arguments that are necessary elements to this litigation. *Lucent Technologies*, 642 F.3d at 740-741 (quoting *Lockyer*, 450 F.3d at 443–44).

The Sacketts' reliance on out-of-circuit authority to argue that, as "private landowners," they "provide an important perspective which is currently absent from the case" is unavailing. ECF No. 45 at 10-11 (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001)). The Ninth Circuit has rejected intervention notwithstanding that the intervenor "offer[ed] a 'unique perspective' on the validity of" the challenged government action. *LULAC*, 131 F.3d at 1305 n.3.

Moreover, the perspective the Sacketts purport to offer is one which the Agencies specifically promoted in adopting the 2020 Rule. In explaining their reasons for adopting the 2020 Rule, the Agencies quoted the Sacketts' case against EPA to decry "the uncertain reach of the Clean Water Act and the draconian penalties imposed" for violations on property owners and the "troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property." 85 Fed. Reg. at 22,270 (quoting *Sackett*, 566 U.S. at 132 (Alito, J., concurring) and *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring)).

In short, "the real differences between" the Sacketts and the Agencies "boil down to strategy calls," namely, whether the Agencies should advance an argument that they previously rejected and which is precluded by well-established law. *Perry*, 587 F.3d at 954. The Sacketts cite no authority holding that intervention as of right is required under such circumstances, and

Ninth Circuit law is squarely to the contrary. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997) (upholding denial of intervention where differences between proposed intervenors and government amounted to "a disagreement over litigation strategy or legal tactics").

Given that the Proposed Intervenors have not satisfied any prongs of the Ninth Circuit's three-factor test for inadequate representation, the Court should deny their requests to intervene as of right.

## II. THE PROPOSED INTERVENORS ALSO HAVE FAILED TO MEET THEIR BURDEN TO SHOW THEY ARE ENTITLED TO PERMISSIVE INTERVENTION.

The same infirmities in the Proposed Intervenors' motions that require denying intervention as of right also demonstrate that permissive intervention is unwarranted. Even where a motion for intervention is timely and the proposed intervenor's claim or defense "shares with the main action a common question of law or fact," permissive intervention is unwarranted where it would "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. Rule. Civ. Proc. 24(b). The Ninth Circuit considers a number of factors to determine whether permissive intervention should be granted, including: (1) "whether the intervenors' interests are adequately represented by other parties"; (2) the "legal position they seek to advance and its relation to the merits of the case"; (3) "whether intervention will prolong or delay the litigation" or otherwise prejudice the original parties; and (4) whether the proposed intervenor will "significantly contribute to full development of the underlying factual issues in the suit." *Spangler v. Pasadena City Bd. Of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

As to the first factor, the Ninth Circuit has repeatedly upheld the denial of permissive intervention where, as here, the proposed "intervenors' interests are adequately represented by other parties." *Perry*, 587 F.3d at 955; *Tahoe Reg'l Planning Agency*, 792 F.2d at 779.

The second and third factors also counsel against intervention. As explained above in Section I.C.2, the sole argument the Sacketts would raise if allowed to intervene must fail as a matter of law. In addition, as set forth in Section I.A.1, the Business Organizations have not identified any arguments they would raise if allowed to intervene, and the arguments they have

made in their comments and other litigation are duplicative of those the Agencies advanced in the 2020 Rule and in opposing Plaintiffs' preliminary injunction motion. Given that the Proposed Intervenors would present redundant or meritless arguments, their intervention would "consume additional time and resources of both the Court and the parties" and the ensuing "delay occasioned by intervention outweigh[s] the value added by the [Proposed Intervenors'] participation in the suit." *Perry*, 587 F.3d at 955–956.

Finally, as to the fourth factor, the Proposed Intervenors will not significantly contribute to the development of the factual issues in the suit because they have provided no grounds for expanding the evidence in this case beyond the administrative record. *See Camp*, 411 U.S. at 142 ("the focal point of judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

For these reasons, the Court should exercise its discretion and deny permissive intervention by the Proposed Intervenors.

## III. IF INTERVENTION IS GRANTED, THE COURT SHOULD IMPOSE CONDITIONS TO AVOID DELAY AND PREJUDICE TO PLAINTIFFS.

If this Court is inclined to grant intervention, Plaintiffs request that the Court only grant one of the two motions to intervene because both the Business Organizations and the Sacketts purport to represent the same interests. The Ninth Circuit has upheld the denial of intervention to one intervenor where the government or "a similarly situated intervenor" was "capable and willing to make all of [the proposed intervenor's] arguments." *Arakaki*, 324 F.3d at 1086–87. Here, the only "perspective" the Sacketts claim to offer that is purportedly "absent from the case" is that of "private landowners." ECF No. 45 at 10. But that perspective is adequately represented by not only the Agencies (as described above) but also the Business Organizations, who claim to "represent countless businesses that *own* and/or use land for a broad variety of business purposes." ECF No. 43 at 2 (emphasis added). Given that each Proposed Intervenor has the burden to show it offers "*necessary* elements to the proceeding," not merely different "litigation strategy or tactics," allowing intervention by both would be needlessly duplicative. *Perry*, 587 F.3d at 954.

That said, if this Court is inclined to allow intervention by both the Sacketts and the Business Organizations, their similar interests warrant an order requiring that:

- The Sacketts and the Business Organizations shall file consolidated briefing in this matter, including briefing for any motions they file or in response to any motions filed by Plaintiffs or other participants in this litigation.
- To avoid duplicative arguments by intervenors, their consolidated briefs on summary judgment or any other matters shall not exceed the page limit allotted by the Local Rules for a single party. Alternatively, if intervenors are allowed to file separate briefs, the total combined pages for those separate briefs shall not exceed the total pages permitted by the Local Rules for a single party.
- The page limits for Plaintiffs' briefing, including motions, shall be enlarged so that the total pages of Plaintiffs' briefs are equal to the sum of the pages available to the intervenors and the Agencies.
- Plaintiffs shall have an additional week to respond to briefs filed by intervenors.[6]

Such reasonable limits on intervention will promote fairness, avoid duplication, and reduce the burden on the Court and Plaintiffs. *See Lucent Technologies*, 642 F.3d at 741 (upholding limitations on permissive intervention that barred "duplicative motions or oppositions" and any "request for attorney's fees"); *Ellis v. Bradbury*, No. C-13-1266 MMC, 2013 WL 4777201, at *2 (N.D. Cal. Sept. 6, 2013) (requirement to file a "joint motion" is a reasonable condition on intervention); Fed. R. Civ. P. 24, Advisory Committee Notes to 1966 Amendments ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.").

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the motions to intervene filed by the Business Organizations (ECF No. 43) and the Sacketts (ECF No. 45). Plaintiffs further request that, in the event the Court does grant leave to intervene to one or both

[6] Plaintiffs reserve the right to seek additional enlargement of time or page limits.

of the Proposed Intervenors, the Court impose reasonable conditions on such intervention to minimize the presentation of duplicative arguments.

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**Application for admission pro hac vice forthcoming*

# CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Andrew R. Wheeler, et al.**

Case No.: **3:20-cv-03005-RS**

I hereby certify that on June 4, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PLAINTIFFS' OPPOSITION TO MOTIONS TO INTERVENE BY: (1) BUSINESS ORGANIZATIONS (ECF No. 43); AND (2) CHANTELL AND MICHAEL SACKETT (ECF No. 45)**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 4, 2020, at Los Angeles, California.

| Ernestina Provencio | /s/ Ernestina Provencio |
|---|---|
| Declarant | Signature |

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